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NO. 891

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner

v.

HOTEL, MOTEL AND CLUB EMPLOYEES UNION, LOCAL 6

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus* in support of the position of the respondent is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 129 national and international labor unions having a total membership of approximately 14,000,000, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The opinions below, jurisdiction, questions presented and the statutory provisions involved are set out at pp. 1-2, 35-42 of the Secretary of Labor's Brief.

SUMMARY OF ARGUMENT

I

The court below held that the Secretary of Labor has the burden of proving that an eligibility rule he challenges under Section 401(e) of the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. 401) is unreasonable. We submit that this Court should hold that this burden is carried only when the Secretary can prove that the rule in question is not a rational means of achieving a legitimate end. As the Court of Appeals concluded, under that standard the Secretary did not prove his case here. The Secretary argues that where the effect of an eligibility rule is to "substantially inhibit the potential breadth of choice" of candidates, the burden of proof is shifted to the Union to justify its rule (Sec. Br. 14-15); that a justification based on the premise that it is legitimate for the membership to enact provisions designed to insure knowledgable and experienced union officers is clearly suspect and probably insufficient as a matter of law, since the "scheme of democracy in this country . . . has . . . been to place trust in the common sense and judgment of an informed electorate" (Sec. Br. 16-17); and that a union must demonstrate that the means it employs to achieve its end is "as narrow as possible" and does not "facilitate the in-group's attempt to suppress . . . competition at the polls" (Sec. Br. 15-16).

Congress did not set out articulated guidelines from which to ascertain the meaning of the term "reasonable qualifications" in Section 401(e). It did, however, express a "mood," *Universal Camera Corp.* v. *National Labor Rela-*

tions Board, 340 U.S. 474, 487 (1951). The basic structure of Title IV, the clearly evinced overall philosophy of the Senators responsible for drafting that Title, and the very nature of eligibility rules all indicate that it is the approach of the Court of Appeals, rather than that of the Secretary, which is faithful to that mood.

The entire plan of Title IV indicates that Congress intended the widest possible preservation of established union procedures and practices. The Act altered or displaced union laws only to the extent that demonstrated past abuses established a compelling need. The statements of overall philosophy made by the Senators who supported and drafted Title IV confirm this interpretation of the Act. And where Congress was careful to preserve, the Secretary and the courts should not rush in to destroy. The broad sweep of authority the Secretary seeks in the instant case would be radically inconsistent with the purposes underlying the Act. This is especially clear since there is no consensus on the proper applicable governing rules in this area to guide him. For eligibility rules by their nature can be evaluated only when viewed in context as an organic outgrowth of a particular polity. Thus, unless the standard we propose is adopted, the Secretary and the courts will be left at large to make *ad hoc* judgments, in other words, they will assume the role of paternalistic regulators contrary to the intent of Congress. The Secretary's brief demonstrates that he has been unable to articulate a coherent approach to Section 401(e) that would place any limits on his discretion. Thus two of the broad *a priori* generalizations offered by the Secretary—that public elections set the standard for union elections, and that the practice of democracy precludes eligibility rules designed to insure wise and experienced leaders—are in direct conflict. The third of his generalizations—that the means

used must be as narrow as possible—is patently unworkable.

In practical terms, the Secretary's position comes down to the proposition that the concept of union democracy requires unions to allow any member who desires to run for office to appear on the ballot, even though he has not established qualifications to hold office by a period of service to the organization or a prior showing of interest in its affairs. He finds support for his position in the statement in Senate Report No. 187 that "individual members are fully competent to regulate union affairs" (Sec. Br. 17). That Report, read in its entirety, is instinct with the intention to allow union members to establish a form of constitutional democracy that is responsive to their needs, as long as the rules they adopt are enacted pursuant to proper democratic procedures. Depriving union members of this right of free men would not only substitute Secretarial and judicial control of unions for membership control contrary to the intent of Congress; it would also threaten the overall public interest. There is no assurance that the Secretary will be invariably correct in believing that the constitutional safeguards the membership has developed are unnecessary. The general public as well as the members will suffer should such safeguards, if they are prudent ones, be overturned.

The arguments made in the Secretary's brief do not appear to be the ones upon which administrative decisions are made. So far as we can determine, they are simply lines of attack evolved for the purposes of this litigation to defend a decision originally based on the bare proposition, now evidently discarded, that any rule which disqualifies a substantial majority of the membership is suspect. Thus the Secretary's arguments must stand or fall on their merits alone; they cannot be defended by an appeal to

administrative expertise. Our assertion is based on the Secretary's Statement of General Policy and Interpretation under Section 401(e), 28 F.R. 14380 (1963), BNA Labor Relations Expeditor 7135. This "effect" test is clearly unsound. The number or percentage of members eligible to appear on the ballot is not a valid indication of whether a rule is reasonable or not.

We wish to make it clear that we do not argue that every eligibility rule must be allowed to pass muster. We argue simply that the courts should overturn only those rules which are arbitrary or which lack a logical connection to a legitimate end. Thus our position is that the courts and the Secretary should normally defer to the decisions of the membership in order to assure that the regulation of eligibility rules is not allowed to work at cross purposes with Congress's overriding intent to limit external interference in union affairs.

II

In *Wirtz* v. *Laborers' Union*, 389 U.S. 477 (1968), this Court considered for the first time the meaning of Sections 402(a) and 402(b) of the Act. The essence of the AFL-CIO's position in its brief filed in that case was that the Secretary has the power to raise and the lower courts have the jurisdiction to consider only those issues which "the union had a fair opportunity to consider in connection with its consideration of [a member's] internal appeal . . . The touchstone is the complaining member's intent as revealed by a liberal and sympathetic reading of his internal appeal" (AFL-CIO's Brief in Nos. 57 & 58, This Term, p. 28). We argued further that because of the equities which favor officers whose elections have not beeen challenged, this general standard should be applied so as to preclude the Secretary from seeking to invalidate the elections of all

the officers elected at the same time on the basis of an internal complaint which alleged a defect in the election of one (*Id.* at 27-28). In *Laborers' Union,* the Secretary argued, as he does here, that Sections 402(a) and 402(b) should be viewed as entirely discrete. His position was, and is, that if he receives a complaint from a union member who has filed an internal complaint, he has *carte blanche* to introduce any issue he may choose into Title IV court litigation without regard to whether or not that issue was raised by a complaint filed with the union (Secretary's Br. in Nos. 57 & 58, This Term, pp. 44-49; Secretary's Br. in No. 891, This Term, pp. 30-34). On the facts of this case the Secretary is forced to make this argument. For the new matters he sought to raise were completely unrelated to the matter raised by the union members internally (App. 19-20). In response to these arguments, this Court held (389 U.S. at 481-482):

> "On the facts of this case we think the Secretary is entitled to maintain his action challenging the June 8 general election because respondent union had fair notice from the violation charged by Dial in his protest of the runoff election that the same unlawful conduct also occurred at the earlier election. We therefore need not consider and intimate no view on the merits of the Secretary's argument that a member's protest triggers a § 402 enforcement action in which the Secretary would be permitted to file suit challenging any violation of § 401 discovered in his investigation of the member's complaint."

We think it fair to say that this holding closely tracks the AFL-CIO's main position on the proper governing standard while rejecting the application of that standard which we proposed. Certainly, we do not see how this Court could have been more explicit in stating that its decision was not to be taken as an endorsement of the Secretary's basic argument. Moreover, the Court's rationale in *Labor-*

ers' Union (*Id.* at 482-483, 484) recognized that Sections 402(a) and 402(b) harmonize two competing interests: the efficient utilization of the enforcement powers granted to the Secretary, and the preservation of union appellate procedures which have been incorporated into the Act's remedial scheme. The "fair opportunity" test, which is the governing standard we propose, and which has won limited approval from this Court in *Laborers' Union,* is consistent with the effectuation of both aspects of Congress intent. Indeed, it is the only standard which fulfills that role. The "trigger" theory advanced by the Secretary, on the other hand, is completely unfaithful to that intent, for it exalts the Secretary's powers to such an extent that the competing interest in the preservation of union internal appellate procedures is rendered trivial.

The legislative history supports our position. The supporters of Title IV in both Houses, and especially in the Senate where this portion of the Act was written, recognized that the public interest in union democracy, as they viewed it, would be secured most satisfactorily by insuring that union members who were dissatisfied with some aspect of their organization's election procedures, and who were unable to obtain internal relief, would receive government assistance in pressing their case in court. As a corollary, the legislators believed that in the absence of any expression of membership dissatisfaction to the union itself, the union's members should be free, without government direction, to run their own elections. The Congressional conception of the public interest rests on three considerations: first, that there is every reason to trust in the probity, judgment and democratic instincts of union members; second, that the vitality of union democracy would be dissipated if the autonomy of the organization were not respected, and if its internal procedures were bypassed and permitted to atrophy; third, that union democracy would

be subverted if the Government were given discretion to intermeddle in internal union matters as to which no member had a complaint. In short, Congress recognized that a limitation on the coercive powers of the Government was an integral component of its overall conception of the public interest in union democracy.

Congress expressed this conception of the public interest by passing legislation which set up a system that balances union autonomy and government regulation. This end was achieved by a legislative guarantee that unions would be responsive to their membership. This guarantee was redeemed by authorizing the Secretary to use his coercive powers for the limited purpose of helping union members achieve the type of organization they desire, rather than by authorizing him to force his views of how the organization should be governed on the membership without regard to their desires. *See, in general,* Cox, *The Role of Law in Preserving Union Democracy,* 72 Harv. L. Rev. 609 (1959); Mitchell, *Safeguards for Union Democracy,* in Slovenko, Ed., Symposium on the Labor-Management Reporting and Disclosure Act of 1959, 135 (1961).

The foregoing, we submit, is the only rational explanation for the inclusion of Section 402(a) in the Act. The requirement that only complaints by union members may be used as a basis for a court suit, and the further requirement that only complaints which have been tendered to the union are a proper predicate for coercive action by the Secretary, make sense only if it is recognized that the enforcement mechanism of Title IV is the product of the desire, first, to promote the responsibility of the union to its members and, equally, of the members to their organization, and second, to protect union self-government and membership sovereignty from the overweening weight of an external government bureaucracy.

The Secretary's main argument in support of his position (Sec. Br. 31, 33) is that the "trigger" theory can be brought into conformity with the complex purposes of the Act by allowing him to substitute a notification to the union prior to instituting suit, which advises it that he is going to proceed on matters which have not been raised by any member, for the Congressional requirement of exhaustion of internal remedies by union members. This argument is untenable. The purpose of Section 402(a) is to foster and protect the public interest in responsible union self-government "by channeling members through the union's internal processes . . . [thereby] accustom[ing] members to utilizing the remedies made available within their organization." *Laborers' Union,* 389 U.S. at 484. And government by the Secretary in the form of a threat to take coercive action by bringing suit which would subject the union to great expense, unless his fiat is obeyed, rather than through a process of interaction between the union and its members, may be called any of several things but not free and democratic self-government. For this Court has often recognized that actions taken under a threat of litigation are not products of free will, *see e.g. Bantam Books* v. *Sullivan,* 372 U.S. 58, 66-67 (1963).

As this Court recognized in *Laborers' Union,* 389 U.S. at 484, the Congressional conception of the public interest in union democracy was multifaceted. It was not an expression of a single-minded belief in the efficacy of coercive regulation through lawsuits brought by the Secretary. That aspect of the Act's enforcement machinery must be harmonized with other interests that were also valued by Congress including union autonomy, membership responsibility, and the preservation of internal union appellate procedures. To extend the Secretary's powers to their furthest possible reach is to destroy these other equally valid interests. On

this basis, we submit that the proper balance can only be struck by limiting the issues that the Secretary can raise in a Title IV court action to those which the union had a fair opportunity to consider in connection with a member's internal complaint.

ARGUMENT

I

THE COURTS SHOULD NOT OVERTURN A UNION RULE REGULATING ELIGIBILITY TO RUN FOR OFFICE UNLESS THE SECRETARY OF LABOR PROVES THAT THE RULE IS NOT A RATIONAL MEANS OF ACHIEVING A LEGITIMATE END

The instant case presents this Court with the opportunity to set out the basic standard of legality upon which union rules governing eligibility to run for union office will be judged under Section 401(e) of the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. 401 *et. seq.*). As the court below properly recognized (App. 318), this task in the first instance involves statutory construction rather than a determination of questions of fact. Thus, while the views of the Secretary of Labor are entitled to respectful consideration, it is this Court which has the final authority, *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, ... U.S. ....., 36 U.S. Law Week 4197, 4200 (March 6, 1968). That authority should be exercised to affirm the judgment below, for not only was the Court of Appeals correct in its characterization of the nature of the question presented, but it was also correct in formulating the answer to that question (App. 318, 320-321):

"In deciding the issue of reasonableness we must

keep in mind the fact that the Act did not purport to take away from labor unions the governance of their own internal affairs and hand that governance over either to the courts or to the Secretary of Labor. The Act strictly limits official interference in the internal affairs of unions. See, *Calhoon* v. *Harvey*, 379 U.S. 134 (1964); *Gurton* v. *Arons*, 339 F. 2d 371 (2d Cir. 1964). The Act prescribes only certain basic minima and leaves the area not covered by these minimum prescriptions to the decisions of the unions themselves."

* * * *

"We do not believe that it is unreasonable for a union to condition candidacy for offices of greater responsibility upon a year of the kind of experience and training that a union member will acquire in a position such as that of membership in Local 6's Assembly."

"The by-laws provide a procedure for their amendment. If the rank and file members of the union had felt at any time during the many years in which the eligibility restriction has been in effect that they were being unjustly barred from office they could have sought to amend the restrictive provision. The record shows no attempt to bring about such an amendment."

The Secretary of Labor makes much of the fact that only about 1,700 members of the union are eligible for election to the 31 elective offices. However, when this number is combined with the fact that all members in good standing for one year have the opportunity to become eligible for office by getting themselves elected to seats in the four hundred-odd member Assembly, the numbers, per se, do not seem to us to establish unreasonableness.

"It is not the function of the Secretary to determine what prescribed qualifications for office will best serve the purposes of union democracy nor to dictate what policy unions should follow in limiting candidacy for union office. The union's own rules as to eligibility must prevail unless they impose unreasonable quali-

fications. We are persuaded that in the present case the Secretary has trespassed upon an area of union governance which is left by the statute to the union's decision. We do not believe that a proper reading of the statute in the light of its history can justify the Secretary's finding that the union has violated Section 401 by adopting the contested eligibility requirements."

The Court of Appeals thus held that the Secretary has the burden of proving that the eligibility rule he challenges is unreasonable, and that his burden is a heavy one in light of the Act's overall policy of "strictly limit[ing] official interference in the internal affairs of unions." While the nature of that burden does not lend itself to precise formulation, we submit that the proper starting point for analysis is that the Secretary must show that the union's rule was not a rational means of achieving a legitimate end. And it is clear that the Court of Appeals concluded that provisions designed to insure experienced and knowledgable officers serve a legitimate end, and that the Union's means of attaining that end—requiring prior service in the Assembly or Shop Delegates' Council—was rational.

Every aspect of the lower court's opinion is rejected by the Secretary in his brief. He argues that where the effect of an eligibility rule is to "substantially inhibit the potential breadth of choice" of candidates, the burden of proof is shifted to the Union to justify its rule (Sec. Br. 14-15); that a justification based on the premise that it is legitimate for the membership to enact provisions designed to insure knowledgable and experienced union officers is clearly suspect and probably insufficient as a matter of law, since the "scheme of democracy in this country . . . has . . . been to place trust in the common sense and judgment of an informed electorate" (Sec. Br. 16-17); and that a union must demonstrate that the means it employs to achieve its end

is "as narrow as possible" and does not "facilitate the in-group's attempt to suppress . . . competition at the polls" (Sec. Br. 15-16).

The provision in Section 401(e) of the Act dealing with union rules governing eligibility to run for office and preserving the right of unions to establish "reasonable qualifications uniformly imposed" on eligibility was inserted in S. 1555, 86th Cong., 1st Sess. (1959) by the Senate Labor Committee. It was enacted without change as part of the final Act. The Senate Labor Committee's Report on S. 1555 (Senate Report No. 187, 86th Cong., 1st Sess. (1959)) contains no explanation of the import of this provision, nor were there any during the floor debates. Moreover, so far as we have been able to ascertain, there is nothing in the Congressional reports or debates prior to S. 1555 which casts any light on the type of union rules that Congress considered unreasonable.

Thus Congress did not set out articulated guidelines from which to ascertain the meaning of the term "reasonable qualifications." It did, however, express a "mood," *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 487 (1951). The basic structure of Title IV, the clearly evinced overall philosophy of the Senators responsible for drafting that Title, and the very nature of eligibility rules all indicate that it is the approach of the Court of Appeals, rather than that of the Secretary, which is faithful to that mood.

The structure of the Act shows that Congress did not paint with a broad brush in drafting Title IV, leaving it to the Secretary in his discretion to evolve a workable statutory program within the broad limits set by the legislature. Instead, Congress, having before it detailed studies of union constitutions, such as United States Department of Labor, Bulletin No. 1239, Union Constitutional Provi-

sions: Election and Tenure of National and International Officers (1958), and National Industrial Conference Board, Handbook of Union Government Structures and Procedures, Studies of Personnel Policy No. 150 (1956), *see* Rezler, *Union Elections: The Background of Title IV of LMRDA,* in Slovenko, Ed., Symposium on the Labor Management Reporting and Disclosure Act of 1959, 482 (1961), chose to regard those constitutions as the basic governing law in this area, *see* Sections 401(e), 401(f), and 401(h), and to legislate interstitially within the framework they provided. In other words, Congress in both Title I and Title IV established a procedural framework to protect membership voting rights on the theory that having done so, the members, rather than the Secretary, could be trusted to evolve constitutional systems responsive to their needs and to the broader public interest as well.

Where Congress did preempt membership decision-making, it dealt in minute particularity with discrete subjects which prior experience had indicated lent themselves to abuses. Thus provisions were made: to accord bona fide candidates mailing rights and membership list inspection and election observation privileges (Section 401(c)); to guarantee the publication of election notices, and to guard against abuse of the check-off system (Section 401(e)); to delineate the permissible uses of union monies during campaigns (Section 401(g)); and to provide adequate officer removal procedures (Section 401(h)). In general, where standards, which are by their nature arbitrary, had to be set, Congress itself set them. Accordingly it was decided: that international and national unions must hold elections once every five years and local unions once every three years (Sections 401(a) and 401(b)); that inspections of membership lists may be made once within a thirty-day period prior to the election (Section 401(c)); that every member in good standing is to be eligible to vote, that elec-

tion notices are to be mailed within fifteen days of the election, and that ballots and other records pertaining to the election are to be preserved for one year (Section 401 (e)). Finally, where Congress did delegate discretionary authority to the Secretary, it did so only in areas where the very nature of the subject matter and the existence of a body of prior law tend to preclude him from roaming far afield. Thus the Secretary is empowered to insure that unions provide adequate safeguards for a fair election and reasonable opportunities for nominations, and he is also authorized to prevent improper interference with members or reprisals against them based on their political activity (Sections 401(c) and 401(e)). In giving substance to these assignments, the Secretary works against the background provided by the National Labor Relations Board's thirty years of experience in running elections free of the influence of restraint or coercion.[1]

The entire plan of Title IV indicates, therefore, that Congress intended the widest possible preservation of established union procedures and practices. The Act altered or displaced union laws only to the extent that demonstrated past abuses established a compelling need. The statements of overall philosophy made by the Senators who supported and drafted Title IV confirm that this is so. They averred that Congress did not intend to "write or rewrite the constitution and bylaws of the Unions" (105 Cong. Rec. 11348-11349, Senate, June 16, 1958 (Colloquy, Senators Morse and Johnson), United States Department of Labor, Legislative History of the Labor Management Reporting and

[1] In recognition of the influence of Board law the Secretary in *Wirtz* v. *Bottle Blowers Assn.*, 389 U.S. 463 (1968) argued successfully that Congress gave him the power to run supervised elections so that he could ensure "laboratory conditions," a Board-created concept, *see* Secretary's Brief, Nos. 57 and 58, This Term, pp. 19-27.

Disclosure Act of 1959, 754 (hereinafter Leg. Hist.)); that it did not intend to "turn over to an arm of the State the responsibility for carrying on the internal governmental processes of voluntary associations" (Senate Report No. 1684 (1958), pp. 12-15, Leg. Hist. 702); that it did not intend to "dictate to the Union that their constitution and bylaws procedure shall be in conducting their elections" or to "turn the Congress of the United States into a constitutional convention and bylaws legislative body for all the unions of America," and that it did not intend to "be imposing upon the Unions our notions of what an election straitjacket should be" (105 Cong. Rec. 6741, Senate, April 25, 1959 (Sen. Morse), Leg. Hist. 805). These views were crystallized in the report of the Senate Labor Committee on S. 1555 (Senate Report No. 187, pp. 5-7, Leg. Hist. 118):

> "1. The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. Trade unions have made a commendable effort to correct internal abuses; hence the committee believes that only essential standards should be imposed by legislation. Moreover, in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents.
>
> "2. Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. The committee strongly opposes any attempt to prescribe detailed procedures and standards for the conduct of union business. Such paternalistic regulation would weaken rather than strengthen the labor movement; it would cross over into the area of trade union licensing and destroy union independence.
>
> * * * *

"The bill reported by the Committee, while it carries out all the major recommendations of the Senate Select Committee, does so within a general philosophy of legislative restraint. . . ."

It was because of these statements and their concrete application in the actual provisions of Title IV that AFL-CIO President George Meany could, and did, appear before the House Committee considering this legislation to support the precursor of the present law, Title IV of S. 1555:

"3. Union elections: The next major subject dealt with in the various versions of the Kennedy bill and in the House bills patterned after S. 505 is union elections. These bills both lay down substantive rules for union elections and provide for their enforcement. Here too, the bills authorize a complaint to the Secretary of Labor and direct that he bring suit in a Federal district court if he finds probable cause to believe that a violation has occurred.

"Again, we believe that the bills here make a substantial contribution toward safeguarding union democracy. The supplying of a Government lawyer to represent the complainant is, as in the case of trusteeships, a substantial advantage to him. Further, the courts have not developed any set of legal principles applicable to union elections comparable to those they have devised for dealing with trusteeships. Thus the regulations of elections contained in these bills will sometimes fill a gap in existing law. In most cases, it is true, that gap is adequately supplied by the constitution of the union itself but not in all instances. . . ."

* * * *

Title IV of S. 1555, as passed by the Senate on April 25, 1959, is not substantially different from Title III of the original Kennedy bill, as reported by the Senate Labor and Public Welfare Committee. When I appeared before you earlier, I expressed our support of these provisions in general and in the first part of this

statement I reiterated our continued support of them." Hearings on H.R. 3540, etc. Before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess. (1959), 1477-1478, 1494.

In short, as this Court stated in *Wirtz* v. *Bottle Blowers Assn.*, 389 U.S. 463, 470-471 (1968):

> "The legislative history shows that Congress weighed how best to legislate against revealed abuses in union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs. The extensive and vigorous debate over Title IV manifested a conflict over the extent to which governmental intervention in this most crucial aspect of internal union affairs was necessary or desirable. In the end there emerged a 'general congressional policy to allow unions great latitude in resolving their own internal controversies. . . .'" *See also Musicians* v. *Wittstein*, 379 U.S. 171 (1964).

Where Congress was careful to preserve, the Secretary and the courts should not rush in to destroy.

The foregoing demonstrates to us that the Secretary's powers under the "reasonable qualification" provision must be circumscribed by the standard we propose in order to bring the administration of this provision into line with the overall purposes of Title IV. The broad sweep of authority the Secretary seeks in the instant case would be radically inconsistent with those purposes. This is especially clear since there is no consensus on the proper applicable governing rules in this area to guide him. For eligibility rules by their nature can be evaluated only when viewed in context as an organic outgrowth of a particular polity. *A priori* generalizations cannot provide criteria for determining the legitimacy of a particular rule in a particular setting, for the practice of constitutional democracy, and the framework of analysis which has been developed to

explain it, yield only the most tentative generalizations. And these generalizations are on too high a level of abstraction and are too remote from practical realities to be hardened successfully into rigid decisional rules. Thus unless the standard we propose is adopted, the Secretary and the courts will be left at large to make *ad hoc* judgments; in other words, they will assume the role of paternalistic regulators contrary to the intent of Congress.

The validity of our view is confirmed by a consideration of the generalizations offered by the Secretary. For the Secretary's brief demonstrates that he has been unable to articulate a coherent approach to Section 401(e) that would place any limits on his discretion. He places primary emphasis on the proposition that the conduct of "elections generally conducted in the United States" provide workable criteria for the application of Section 401(e) (Sec. Br. 14, 16, 17).[2] This proposition will not bear scrutiny. For example, the Constitution of the United States requires

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[2] The Secretary's attempt to find comfort in the general conduct of public elections in the United States in support of his contention that the Union's eligibility rule works an unacceptable prior restraint on voter choice, is clearly unavailing if the practical differences between public elections and an election in a local union are taken into account. In Local 6, as in most local unions, a member who satisfies the organization's written requirements and who can obtain the support of one or two fellow members, can appear on the ballot. Thus the union's written eligibility rules are the only barrier of any sort to a potential candidate. To the contrary, in public elections, as this Court has recognized, the normal method of access to a place on the ballot is by securing the nomination of one of the major parties, *see Smith* v. *Allwright*, 321 U.S. 649 (1941). Securing such a nomination is often an arduous, costly, and time-consuming process, and for precisely these reasons is closed to the great majority of citizens. Taking these factors into account, we submit that the restraints on voter choice are probably greater in public elections than in those conducted by Local 6.

candidates for the Presidency and the Congress to meet certain age, citizenship, and residency requirements. The Federalist Papers explain the rationale behind these qualifications in the following terms:

> "The qualifications proposed for senators as distinguished from those of representatives, consist in a more advanced age, and a longer period of citizenship. A senator must be thirty years of age at least; as a representative must be twenty-five. And the former must have been a citizen nine years; as seven years are required for the latter. The propriety of these distinctions is explained by the nature of the senatorial trust; which, requiring greater extent of information and stability of character requires at the same time, that the senators should have reached a period of life most likely to supply these advantages: and which, participating immediately in transactions with foreign nations, ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education." *Federalist and Other Constitutional Papers,* Scott Foresman & Co., Chicago, 1898, Vol. I, No. LXII, p. 339.

It is generally agreed that sober and rational consideration went into the formulation of these Constitutional eligibility rules and that these rules have worked well as an integral part of this country's political structure. This does not mean, however, that a union could utilize the example of the Constitution by adopting a rule requiring its major executive officers to be thirty-five years of age and a member of the union for fourteen years, in the secure belief that the acknowledged wisdom of the founding fathers was accruing to it thereby. For its needs, structure, function, and purposes are far different from those of the entire society. And what is meet and proper for one group is not necessarily a soundly conceived solution for the problems of another.

While the structure of the Constitution does not provide easy answers to hard cases that arise under Section 401(e), it does refute the facile generalization, relied upon by the Secretary in his brief, that the "scheme of democracy in this country" is to place absolute "trust in the common sense and judgment of an informed electorate" (Sec. Br. 17). It demonstrates that eligibility rules designed to insure wise and experienced officials are entirely consistent with the constitutional democracy of the United States. Moreover, the Constitutional provisions we have been discussing also indicate the basic fallacy in the Secretary's suggestion (Sec. Br. 16) that the means employed to achieve a particular end must be "as narrow as possible" to be lawful. For any effort in this field is vulnerable under that standard. Thus, we do not believe that it is possible to construct a rational argument for the proposition that the eligibility rules in the Constitution are the narrowest possible means for achieving the ends sought there. Many Americans under thirty-five years of age are assuredly as wise as the majority of those who have reached that age. And there are surely many Americans who are not "natural born" who are fit to be President. Judgments in this area have to be prudential, and since this is so they cannot be demonstrated to be sound or unsound through a process of rigorous deductive logic.[3]

Thus two of the broad *a priori* generalizations offered by the Secretary—that public elections set the standard for union elections, and that the practice of democracy precludes eligibility rules designed to insure wise and experienced leaders—are in direct conflict. The third of his gen-

[3] It is for this reason that the portion of the Secretary's argument (Sec. Br. 18-21) which attempts to show that not every experienced member is allowed to run for office is beside the point. There are, of course, factual difficulties with this aspect of the Secretary's brief as well, as the Union points out in its brief.

eralizations—that the means used must be as narrow as possible—is patently unworkable. This of course puts the Secretary's analysis into serious question.

Once these generalizations are put to one side, as we have just shown they should be, the Secretary's position in practical terms comes down to the proposition that the concept of union democracy requires unions to allow any member who desires to run for office to appear on the ballot, even though he has not established qualifications to hold office by a period of service to the organization or a prior showing of interest in its affairs. He finds support for his position in the statement in Senate Report No. 187 that "individual members are fully competent to regulate union affairs" (Sec. Br. 17). That Report, read in its entirety, is instinct with the intention to allow union members to establish a form of constitutional democracy that is responsive to their needs, as long as the rules they adopt are enacted pursuant to proper democratic procedures. The sound reading of Senate Report No. 187 is that Congress intended to allow union members to exercise the basic right exercised by the members of any polity governed by a constitution: the right to set up basic inhibitions on future action in moments of calm deliberation when there is reason to believe that without those inhibitions the group may, in moments of stress and high emotion, take actions which would not be in its long-term interests and which might indeed threaten its survival. For the very *raison d'etre* of a constitution is to allow a group to safeguard itself against unsound, unwise, or improvident actions in the future. Depriving union members of this right of free men would not only substitute Secretarial and judicial control of unions for membership control contrary to the intent of Congress; it would also threaten the overall public interest.

There is no assurance that the Secretary will be invariably

correct in believing that the constitutional safeguards the membership has developed are unnecessary. The general public as well as the members will suffer should such safeguards, if they are prudent ones, be overturned. The Act is based on the conclusion that the powers of unions are such that the public has an interest in their internal affairs. It was this Court's recognition of the public interest which caused it to reject the argument that a second regularly scheduled election moots a case by the Secretary, *see Bottle Blowers Assn.*, 389 U.S. at 474-475. By the same token the public interest factor also undermines the Secretary's argument here, for its adoption would give the Secretary and the courts sweeping powers which would threaten the effectiveness of unions in their role as a collective bargaining agent. The skill, wisdom, and restraint of union officers in shaping the union's demands and in calling for the employment of the union's ultimate weapon—the strike—are of crucial importance to the economic health of the country.

The Secretary's appeal to the norms of the "labor community," while sounder than his appeal to the norms of our national electoral process, *see* pp. 19-21 *supra* is also fundamentally defective. The labor community may justly be viewed as many communities. Local 6 does not confront the same problems as does a small craft union of fifty members or a large industrial union whose many members work at a single plant. It is a large union in a large city, composed of members who pursue different callings in hundreds of establishments. The problems it faces, and its structural response to those problems, are a product of these unique attributes as well as of the fact that it is a labor union. The very response here in question—the creation of a broadly based assembly composed of unpaid rank and file members —is to our knowledge unusual. It cannot be pigeon-holed in the slot "prior office holding requirement" on the theory

that this will aid analysis. The type of prior office holding requirement found in Local 6 is simply radically different from others which require holding a paid office, a status which does to an extent identify the office holder with the administration. Once the rule is analyzed in its particularity, it may be most accurate to characterize it as a rule to require candidates to be familiar with and experienced in the workings of the union. So defined, it has many counterparts. For example, the constitutions of 15 international unions with a total membership of approximately 5,000,000 have meeting attendance requirements; 15 others, with a total membership of 4,500,000 have a two- to three-year membership requirement, *see* United States Department of Labor, Union Constitutions and the Election of Local Union Officers, 41, 49 (1965). Both of these rules, as well as Local 6's rule, fall within the category we have just stated. Indeed it is Local 6's complex character and large size which makes it impractical for it to employ those means to that end. Thus, the rule here does or does not depart from a norm, depending on the point from which the analysis begins. The foregoing indicates the difficulties of determining with any precision what the norms of the labor community are, difficulties the Secretary does not deal with at all. But it does more; it indicates that the fact that a rule is unusual does not prove that it is unreasonable or in conflict with democratic principles. For example, the State of Nebraska has the only unicameral legislature in this country; yet we would assume that Nebraska is not to be deemed undemocratic on that showing alone. Thus the defect in the Secretary's argument is one pointed out with consummate skill in the dissenting opinion of Mr. Justice Brandeis in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 308 (1932), an opinion that has long since carried the day in Fourteenth Amendment litigation and in the wider area of public opinion as well:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive laws as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."

Finally, the Secretary argues (Sec. Br. 21-24) that Local 6's eligibility rule is unreasonable because it "provides a facile method for the Administration party to maintain control." The Secretary's argument disregards the distinction between the consequences of the rule itself and the consequences of the preferences of the Union's members in elections for the Assembly. The rule simply requires prior membership in the Assembly or the old Shop Delegates Council in order to run for office; and there is no contention that the prerequisite for running for these bodies, one year's good standing, is unreasonable. Thus the rule is not the reason that most of those eligible to run for executive office have a past identification with the Administration party. This result has been brought about by the fact that the membership has consistently preferred the candidates of that party. The rule itself is perfectly consistent with the attainment of any conceivable political division in the Assembly. It is neutral in this regard. Of course it can be argued that at this historical point in time the rule works

to the disadvantage of a certain group. But this is always true of any rule. To accept this argument is to sanction anarchy.

Thus the Court of Appeals was not suggesting that the rule was reasonable because an opposition could rise to power by a two-stage process (Sec. Br. 23). It simply recognized that there has been a continuous opportunity for any interested member who opposed the incumbents to put himself in a position to challenge them. To the extent that this has failed to occur it is not because of unfair rules of the game but because of a failure of the outs to appeal to the electorate. Consistent with a regard for logic, it is simply impermissable to proceed from the fact that a party has achieved hegemony to the assertion that this proves that the rules unfairly favor that party. For example, the fact that the Republican Party controlled the White House from the Civil War until 1932, and the statehouse in Vermont for approximately one hundred years, and that the Democratic Party controlled the White House from 1932 until 1952, and was as completely dominant in the South for one hundred years as were the Republicans in Vermont, does not prove that the elections in this country have not been democratic.

The essential fallacy of the Secretary's position is his failure to appreciate the fact that in-groups cannot pass constitutional rules by themselves. It requires at least 51% of the membership or 51% of their freely elected representatives to do so. And, as the court below noted, the membership has a continuing opportunity to change those rules by the same democratic processes. This has always been true in practice in the great majority of unions; it is now true by the force of federal law. It is for this reason that unreasonable qualifications on eligibility are bound to be few and far between. For the mem-

bers of a union are unlikely to pass rules which may disqualify them in the future without good and sufficient reasons for doing so. The recognition of this point is absolutely critical; for the Secretary's brief (Sec. Br. 18, 21-24), to bolster its argument, continuously attempts to side-step it with unproved allegations that the eligibility rule in question is an attempt to "stifle dissent" and to deprive the members of the right to pass "judgment . . . themselves." The point of the matter is that the membership has passed judgment; they passed the rule the Secretary seeks to overturn.

To this point, we have met the Secretary on the grounds he has chosen. But we must note that those grounds do not appear to be the ones upon which administrative decisions are made. So far as we can determine, they are simply lines of attack evolved for the purposes of this litigation to defend a decision originally based on the bare proposition, now evidently discarded (Sec. Br. 21), that any rule which disqualifies a substantial majority of the membership is presumptively illegal. Thus the Secretary's arguments must stand or fall on their merits alone, they cannot be defended by an appeal to administrative expertise. Our assertion is based on the Secretary's Statement of General Policy and Interpretation under Section 401(e). This Statement, which is the only authoritative expression of the Secretary's policy enunciated by him, reads as follows, 28 F.R. 14380 (1963), BNA Labor Relations Expediter 7135:

> "(b) The question of whether a qualification is reasonable is a matter which is not susceptible to precise definition and in the last analysis will be determined by the courts. Under certain circumstances a prerequisite for such candidacy may on its face appear to be reasonable, but this would not be controlling if, as a matter of fact, the effect of its application would be unreason-

able and inharmonious with the intent of the Act's election provisions. For example, a requirement that to be eligible to be a candidate for office an individual must have been a 'member in good standing' for a prescribed period of time, such as two or three years, would not be, in many instances, an unreasonable qualification. However, should the actual effect of such qualification in a particular case be to disqualify from holding office all but a handful of the labor organization's members, its reasonableness would be subject to serious question."

This "effect" test is clearly unsound. The number or percentage of members eligible to appear on the ballot is not a valid indication of whether a rule is reasonable or not. This test makes it all but impossible for unions to evolve eligibility rules which they can be reasonably confident will satisfy the law. For example, let us suppose that an international union decides that any member can run for local office who attends three of the union's monthly meetings during the year prior to the election. It seems clear that on its face this is a reasonable rule. Certainly, the minimum that Congress intended by Section 401(e) is that some qualifications over and above paid-up membership may be imposed. And the rule we suggest is adapted toward what we regard as a clearly legitimate end, insuring that members have a basic familiarity with the union's affairs; and it is a rational means of achieving that end which is not unduly burdensome in any way. Let us suppose further that in one local only 10% of the members attend three meetings, while in another local 65% do so. And let us suppose again that there are no structural differences between the locals and no evidence of misconduct by the officers of the first local. The "effect" test would indicate that the rule is illegal as applied to the first local and legal as applied to the other. In addition, the "effect" test precludes experimentation with new types of eligibility rules. Espe-

cially where the effect of the rule depends upon the degree of active interest in the union by the membership, no one can be certain what that effect will be. The only thing that is clear is that it is bound to vary from election to election. This means that the Secretary's position serves to undercut responsible internal union decision making. This is in direct opposition to the overall purposes of the Act.

In conclusion, we wish to make it clear that we do not argue that every eligibility rule must be allowed to pass muster. We argue simply that the courts should overturn only those rules which are arbitrary or lack a logical connection to a legitimate end. Thus, our position is that the courts and the Secretary should normally defer to the decisions of the membership in order to assure that the regulation of eligibility rules is not allowed to work at cross purposes with Congress' overriding intent to limit external interference in union affairs.

II

IN A TITLE IV LAWSUIT THE SECRETARY DOES NOT HAVE THE POWER TO RAISE AND THE DISTRICT COURTS DO NOT HAVE THE JURISDICTION TO CONSIDER ISSUES WHICH THE UNION DID NOT HAVE A FAIR OPPORTUNITY TO CONSIDER IN CONNECTION WITH AN INTERNAL UNION APPEAL

In *Wirtz* v. *Laborers' Union*, 389 U.S. 477 (1968), this Court considered for the first time the meaning of Sections 402(a) and 402(b) of the Act, which provide:

> "Sec. 402. (a) A member of a labor organization—
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization."

The essence of the AFL-CIO's position in its brief filed in that case was that the Secretary has the power to raise and the lower courts have the jurisdiction to consider only those issues which "the union had a fair opportunity to consider in connection with its consideration of [a member's] internal appeal . . . The touchstone is the complaining member's intent as revealed by a liberal and sympathetic reading of his internal appeal" (AFL-CIO Brief in Nos. 57 & 58, This Term, p. 28). We argued further that because of the equities which favor officers whose elections

have not been challenged, this general standard should be applied so as to preclude the Secretary from seeking to invalidate the elections of all the officers who were elected at the same time on the basis of an internal complaint which alleged a defect in the election of one (*Id.* at 27-28). In *Laborers' Union*, the Secretary, as he does here, argued that Sections 402(a) and (b) should be viewed as entirely separate and distinct. His position was, and is, that if he receives a complaint from a union member who has filed an internal complaint, he has *carte blanche* to introduce any issue he may choose into Title IV court litigation without regard to whether or not that issue was raised by a complaint filed with the union (Secretary's Br. in Nos. 57 & 58, This Term, pp. 44-49; Secretary's Br. in No. 891, This Term, pp. 30-34). On the facts of this case the Secretary is forced to make this argument. For the new matters he sought to raise were completely unrelated to the matter raised by the union members internally (App. 18-19). Thus it is plain that the Secretary can prevail here only if the standard he proposes is accepted. On the basis of these arguments this Court held (389 U.S. at 481-482):

> "On the facts of this case we think the Secretary is entitled to maintain his action challenging the June 8 general election because respondent union had fair notice from the violation charged by Dial in his protest of the runoff election that the same unlawful conduct also occurred at the earlier election. We therefore need not consider and intimate no view on the merits of the Secretary's argument that a member's protest triggers a § 402 enforcement action in which the Secretary would be permitted to file suit challenging any violation of § 401 discovered in his investigation of the member's complaint."

We think it fair to say that this holding closely tracks the AFL-CIO's main position on the proper governing standard while rejecting the application of that standard

which we proposed. Certainly, we do not see how this Court could have been more explicit in stating that its decision was not to be taken as an endorsement of the Secretary's basic argument. Thus, we submit that the Secretary is in error when he suggests (Sec. Br. 31) that the Court's rationale in *Laborers' Union* requires acceptance of his position here. That rationale was (*Id.* at 482-483, 484):

> "It is most improbable that Congress deliberately settled exclusive enforcement jurisdiction on the Secretary and granted him broad investigative powers to discharge his responsibilities, yet intended the shape of the enforcement action to be immutably fixed by the artfulness of a layman's complaint which often must be based on incomplete information. The expertise and resources of the Labor Department were surely meant to have a broader play. Second, so to constrict the Secretary would be inconsistent with his vital role, which we emphasize today in *Wirtz* v. *Local 153, supra,* in protecting the public interest bound up in Title IV. The Act was not designed merely to protect the right of a union member to run for a particular union office in a particular election. Title IV's special function in furthering the general goals of the LMRDA is to insure free and democratic union elections, the regulations of the union electoral process enacted in the Title having been regarded as necessary protections of the public interest as well as of the rights and interest of union members.
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> "It is true that the exhaustion requirements was regarded by Congress as critical to the statute's objective of fostering union self-government. By channeling members through the internal appellate processes, Congress hoped to accustom members to utilizing the remedies made available within their own organization; at the same time, however, unions were expected to provide responsible and responsive procedures for investigating and redressing members' election grievances. These intertwined objectives are not disserved

> but furthered by permitting the Secretary to include in his complaint at least any § 401 violation he has discovered which the union had a fair opportunity to consider and redress in connection with a member's initial complaint."

Thus, the Court recognized that Sections 402(a) and 402(b) harmonize two competing interests: the efficient utilization of the enforcement powers granted to the Secretary and the preservation of union appellate procedures which have been incorporated into the Act's remedial scheme. The "fair opportunity" test, which is the governing standard we propose, and which has won limited approval from this Court in *Laborers' Union,* is consistent with the effectuation of both aspects of Congress's intent. Indeed, it is the only standard which fulfills that role. The "trigger" theory advanced by the Secretary, on the other hand, is completely unfaithful to that intent for it exalts the Secretary's powers to such an extent that the competing interest in the preservation of union internal appellate procedures is rendered trivial.

Before turning to a consideration of the relevant legislative history and an elaboration of our argument, we wish to make one further point about the decision in *Laborers' Union.* The Secretary argues (Sec. Br. 30-31) that this point need not be reached if he succeeds in his attempt to have the Court overturn the adverse rulings he has suffered in his challenge to the Union's eligibility rule. The short answer to this position has been stated by this Court (389 U.S. at 480):

> "The merits of this question have been fully briefed and argued in this Court and the underlying issue of statutory construction has already been the subject of several and conflicting rulings by various federal courts. The interests of judicial economy are therefore best served if we proceed to resolve this important question now."

1. Sections 402(a) and 402(b) of the Act are the direct outgrowth of Sections 302(a) and 302(b) of S. 3974 (85th Cong., 2nd Sess.) as it was reported by the Senate Labor Committee and as it passed the Senate on June 17, 1958; and of Sections 302(a) and 302(b) of S. 1555 (86th Cong., 1st Sess.) as it was reported by that Committee and as it passed the Senate on April 25, 1959. These bills in turn stemmed from Sections 4(a) and 4(b) of S. 3751 (85th Cong., 2nd Sess.) as it was introduced by Senator Kennedy on May 5, 1958. The original Landrum-Griffin Bill, H.R. 8342 (86th Cong., 1st Sess.) as it passed the House, as well as the earlier version of H.R. 8342 which was reported out of Committee, contained a different procedure for judicial enforcement, one providing for direct court actions by union members rather than suits by the Government.[4] The Conference Committee adopted in its entirety and without change, the language of Sections 302(a) and 302(b) of S. 1555, and the Conference Committee's version of the legislation in this regard was enacted into law.

After S. 3974 was reported out of Committee in 1958, there were no changes of substance, so far as the issue presented here is concerned, in the language of what was

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[4] H. R. 8342 as it passed the House provided:

"Sec. 402(a) A member of a labor organization—

(1) who is aggrieved by any violation of section 401, and

(2) who (A) has exhausted the reasonable remedies available under the constitution and bylaws of such organizations and of any national or international labor organization with which such organization is affiliated, or (B) has diligently pursued such available remedies without receiving a final decision within six calendar months after their being invoked, may bring a civil action against such labor organization in any district court of the United States for the district having jurisdiction of such labor organization to prevent and restrain such violation and for such other relief as may be appropriate, including the holding of a new election under the supervision of the Secretary and in accordance with the provisions of this title. Where an election has already been held at the

to become Sections 402(a) and 402(b) of the Act.[5] While the enforcement provisions of Title IV did undergo some change during Congress's deliberations, the basic structure of the exhaustion of internal remedies requirement was set from the inception of the process that led to the final Act. Thus it is clear that the primary sources for the proper approach to the interrelationship between these Sections are the relevant statements of Senator Kennedy, the original sponsor of the measure, and the majority reports of the Senate Labor Committee on S. 3974 and S. 1555. In his remarks on the floor explaining S. 3751, Senator Kennedy stated:

"At the present time, if a union member feels that his rights have been jeopardized in an election, he is

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time such action is brought, such election shall be presumed valid pending a final decision thereof, as hereinafter provided, and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(b) For the purposes of this section, district courts of the United States shall be deemed to have jurisdiction of a labor organization in the district in which such labor organization maintains its principal office. The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff, or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." Leg. Hist. 828.

[5] The following are the only changes made after S. 3974 was reported out of committee. First, S. 3974 required the complaining member to have exhausted internal remedies for four months rather than three, and required the Secretary to bring suit within 30 days rather than 60. Second, the phrase "pertaining to the election and removal of officers" in the first parenthesis in the text of Section 402(a) was not included in Section 302(a) of S. 3974. Third, the provisions relating to a procedure for removing officers, and for court preservation of assets, both of which are found in Section 302(b) of S. 1555 as it passed the Senate and in Section 402(b) of the Act, were not included in Section 302(b) of S. 3974. Fourth, only Section 302(b) of S. 1555 contained a provision relating to service of process.

able to appeal to a State court. I have done some research into that matter, and I believe we have found that only one local union election in recent years has been set aside as a result of an attempt by a member to obtain his rights by appealing to a State court. The classic example of the difficulties involved is that of the 13 members of the teamsters union, who, after weeks and months of litigation, have had to accept a settlement which is highly unsatisfactory in regard to the holding of an election; but the lawyer for the rank-and-file members has submitted a bill for $300,000. So that is, I believe, the classic example of the fact that the right of the members to appeal to a State court is useless.

"In the bill we provide the right to appeal to the Secretary of Labor, whenever a member believes that his rights, as provided in the bill in the case of an election, have been denied to him. Then the Secretary of Labor in effect becomes the union member's lawyer. Such a provision is infinitely stronger than any provision now in effect." 105 Cong. Rec. 10947-10948, Senate, June 12, 1958, Leg. Hist. 1093.

In addition, the majority reports of the Senate Labor Committee also contain a very explicit explanation of the purpose of the exhaustion of internal remedies requirement contained in Sections 402(a) and 402(b). Thus, Senate Report No. 1684, pp. 12-15, Leg. Hist. 701 states:

"The foregoing provisions are to be enforced by the Secretary of Labor, upon complaint of any union member, through court action similar to the proceedings to lift improper trusteeships. In filing a complaint the member must show that he has pursued any remedies available to him within the union and any parent body in a timely manner. This rule preserves a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections. If the member is denied relief by the union or can obtain no decision from the

union one way or the other within 4 months, he may complaint to the Secretary."

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"The committee gave careful study to various proposals providing for the conduct of union elections by the National Labor Relations Board upon the request of a small percentage of the members. The committeee rejected this approach for two reasons.

"One fundamental objection is that these proposals turn over to an arm of the State the responsibility for carrying on the internal governmental processes of voluntary associations without any showing that the union officers and members are incompetent or corrupt. Such a measure does not promote freedom or democracy. It reduces self-government. It denies the private responsibility and self-determination which lie at the heart of a voluntary association."[4] *See also* Senate Report No. 187, 86th Cong., 1st Sess., pp. 5-7, Leg. Hist. 118 (quoted on pp. 16-17 *supra*).[6]

Two final points should be noted in order to complete the legislative picture. First, while the approach taken in the original Landrum-Griffin Bill, as it passed the House, was different from that taken in the Senate, that bill also contained a requirement of exhaustion of internal remedies. Thus as to this matter the dominant factions in both Houses of Congress were of one mind, *see* n. 4, pp. 34-35, *supra*, and

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[6] The first portion of this statement appears again in Senate Report No. 187, pp. 19-22, Leg. Hist. 778. With the exception of the above-noted statements, the framers of Sections 402(a) and 402(b) limited themselves to analyses of the bill which track its language and are thus of little help in the resolution of the issue presented here. This is also true of the remarks made by the House supporters of the Senate approach. *See e.g.*, 105 Cong. Record 7953-4, Senate, May 5, 1958, Sen. Kennedy, Leg. Hist. 699; Senate Report No. 187, pp. 46-50, Leg. Hist. 780; 105 Cong. Record 7024-5, Senate, April 29, 1959, Sen. Kennedy, Leg. Hist. 808; 105 Daily Cong. Record A-6573, Appendix July 29, 1959, Rep. Brademas, Leg. Hist. 815; House Conference Report 1147, 86th Cong., 2d Sess., pp. 33-35, Leg. Hist. 835.

105 Cong. Record 15707-15708, House, August 12, 1959, Leg. Hist. 823. Second the inclusion and retention of the exhaustion of internal remedies requirement was a conscious choice made with full recognition of the consequences it entailed. For a minority of Senators, led by Senator Goldwater, argued with vigor that the provision would hinder the effective enforcement of the statute, *see e.g.*, 105 Cong. Record 16489, Senate, August 20, 1959, Sen. Goldwater, Leg. Hist. 830; Senate Report No. 187, pp. 103-104, Minority Views, Leg. Hist. 783.

2. The purport of this legislative history is clear. The supporters of Title IV in both Houses, and especially in the Senate where this portion of the Act was written, recognized that the public interest in union democracy, as they viewed it, would be secured most satisfactorily by insuring that union members who were dissatisfied with some aspect of their organization's election procedures, and who were unable to obtain internal relief, would receive government assistance in pressing their case in court. As a corollary, the legislators believed that in the absence of any expression of membership dissatisfaction to the union itself, the union's members should be free, without government direction, to run their own elections. The Congressional conception of the public interest rests on three considerations: first, that there is every reason to trust in the probity, judgment and democratic instincts of union members; second, that the vitality of union democracy would be dissipated if the autonomy of the organization were not respected, and if its internal procedures were bypassed and permitted to atrophy; third, that union democracy would be subverted if the Government were given discretion to intermeddle in internal union matters as to which no member had a complaint. In short Congress recognized that a limitation on the coercive powers of the Government was

an integral component of its overall conception of the public interest in union democracy.

Congress expressed this conception of the public interest by passing legislation which set up a system that balances union autonomy and government regulation. This end was achieved by a legislative guarantee that unions would be responsive to their membership. This guarantee was redeemed by authorizing the Secretary to use his coercive powers for the limited purpose of helping union members achieve the type of organization they desire, rather than by authorizing him to force his views of how the organization should be governed on the membership without regard to their desires. *See, in general,* Cox, *The Role of Law in Preserving Union Democracy,* 72 Harv. L. Rev. 609 (1959); Mitchell, *Safeguards for Union Democracy* in Slovenko, Ed., Symposium on the Labor-Management Reporting and Disclosure Act of 1959, 135 (1961).

The foregoing, we submit, is the only rational explanation for the inclusion of Section 402(a) in the Act. The requirement that only complaints by union members may be used as a basis for a court suit, and the further requirement that only complaints which have been tendered to the union are a proper predicate for coercive action by the Secretary, make sense only if it is recognized that the enforcement mechanism of Title IV is the product of the desire, first, to promote the responsibility of the union to its members and equally of the members to their organization, and second, to protect union self-government and membership sovereignty from the overweening weight of an external government bureaucracy.

The entire remedial scheme is reduced to a logical and practical absurdity if the Secretary is held to have the power to bring a suit based on matters not raised by union members in their internal complaint. Suppose, for example,

that a union has an eligibility rule which the membership wishes to retain and which the Secretary believes is unsound and should be changed. The union holds an election in 1963 as to which no internal complaint is filed but as to which a direct appeal to the Secretary is made alleging that opposition candidates were threatened with reprisals. No court action is taken because there was no exhaustion of remedies. In 1966, the union holds its next regularly scheduled election and it receives one complaint alleging that the ballot box was stuffed. It investigates and rejects the appeal as unwarranted. The complainant goes to the Secretary who investigates and concludes that the complaint is without substance and who then files a suit challenging the eligibility requirement. Allowing the Secretary to bring suit in the second instance, even though he is plainly barred in the first, would reduce the exhaustion of remedies requirement to a lifeless formality devoid of any actuating principle which explains and justifies its inclusion in the Act. It would also run counter to the interest in having all defects in an election raised as expeditiously as possible so that they can be considered when the evidence is fresh, and in order to insure that there will be a complete record on which to decide whether to consider the election proper and final or so improper or vulnerable to attack at a higher level that it should be considered a nullity. On the other hand, as we have just attempted to show, if the Secretary is barred from proceeding in both instances, as Congress intended, the compelling logic of the exhaustion of remedies' requirement is preserved.

The position we argue for is strengthened further when the import of Section 601 of the Act is taken into account. For Section 601 has been construed to afford the Secretary broad visitatorial powers, *see e.g. Wirtz* v. *Local 191, Teamsters*, 321 F.2d 455 (C.A. 2nd Cir., 1964). But those visitatorial powers are not accompanied by a grant of

coercive powers. Thus, Congress was not of the view that the Secretary should have the right to go into court whenever he uncoveres conduct he believes to be illegal. Instances where the Secretary believes that there is an uncorrected wrong, but cannot secure court relief, are a natural product of the overall balance between union autonomy and government power that Congress struck in this area. There are sound reasons for this distribution of power when the Secretary's persuasive role in administering the Act as opposed to his coercive role, is taken into account. For, if the Secretary uncovers election violations which were not discovered by the membership, or to which the members have made no objection, he can inform them and the general public of his findings. The possibility of disclosure, as Congress recognized, has a strong prophylactic effect on union action. Moreover, if an investigation indicates fraud or other wrong-doing, disclosure could lead to membership action to remove the officers responsible, *see* Section 401(h), or to criminal proceedings, *see* Section 607. In this regard, it should not be forgotten that the overall title of this act is "The Labor-Management Reporting and Disclosure Act of 1959" and that the title is the reflection of the Congressional belief that disclosure in and of itself is a powerful weapon. As the District of Columbia Circuit noted:

> "The public disclosure functions of Section 601 have a certain similarity of purpose with the disclosure concepts of the Securities and Exchange Act; to a degree each has as its purpose ventilation of facts in which the public at large, as well as a particular segment—here union members—have a genuine interest. A labor union is not a private enterprise. Congress seems to have thought that reporting and disclosure would serve a prophylactic function, deterring some of the corrupt practices and acts of untrustworthiness on the part of union officers which Congress had found prevalent, and would enable union members to govern

their organizations more intelligently." *International Brotherhood of Teamsters* v. *Wirtz*, 346 F.2d 827, 831 (C.A. D.C. Cir., 1965).

There are two types of cases in which the Secretary has attempted to litigate issues not raised by any union member. The first are those, of which the instant case is an example, in which allegations are raised by the Secretary concerning conduct which is said to violate the applicable union constitution or the provisions of the Act. The second are those in which the Secretary challenges provisions of the union's constitution and bylaws as unlawful, *see Locals 545, etc., Operating Engineers* v. *Wirtz*, 381 F.2d 448 (C.A. 2nd Cir., 1967).

There can be no doubt that the "conduct" cases are precisely governed by the exact words of Senate Report No. 1684, p. 12, Leg. Hist. 701 that "[the] rule [requiring exhaustion of remedies] preserves a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections." A suit based on conduct, which allegedly violates a union constitution, or the safeguards established by the Act, and which was not raised by a union member in an internal complaint, plainly runs counter to this statement of Congressional intent. The cases challenging provisions of a union's constitution have focused on Section 401(e) which permits unions to set reasonable qualifications on the right to run for office. The very purpose of allowing unions to set reasonable qualifications is to enable each organization to set up a system of self-government responsive to its needs, *see* pp. 10-29 *supra*. Such a challenge, which does not lend itself to any simple or precise answer, may, therefore, bring into question the most deep-seated assumptions upon which the organization is built, and it may call for a sensitive balancing of considerations of a political nature.

Moreover, many internal appeals do not raise straightforward questions of statutory law. They often raise questions which require an interpretation of the union's constitution, and are usually grounded in particular facts, and in the practices, usages, and traditions of the group *see Laborers' Union,* 389 U.S. at 480-481. As to these matters the union is the logical agency to which to look for expertise. Thus, as in the conduct cases, the officers of the union must, before the Government's coercive powers are invoked, be allowed the first opportunity to assess the validity of the rule in light of the objections of those members who consider themselves aggrieved by it. Prior consideration of the rule may obviate the need for litigation, or, if litigation proves necessary, may prove illuminating to the courts. In addition, given the nature of the judgment that must be made when a rule is challenged as unreasonable, surely there is no other area of the Act as to which it is as necessary to ascertain the membership's desires. The members know the organization best and if they have all reached the conclusion that they wish to abide by a certain set of rules, the Congressional policy, which is to insure that the organization is responsive to their desires, is being fulfilled.

In the leading case of *United States* v. *L. A. Tucker Truck Lines,* 344 U.S. 33, 36-37 (1952), Mr. Justice Jackson stated:

> "We have recognized in more than a few decisions and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. It is urged in this case that the Commission had a predetermined policy on this subject which would have required it to overrule the objection if made. While this may well be true, the Commission

> is obliged to deal with a large number of like cases. Repetition of the objection in them might lead to a change of policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence. Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." (footnotes omitted)

We suggest that in Title IV Congress placed its trust in the union as the initial tribunal for deciding election appeals, since it can offer speedy relief after hearing from all the interested parties, and since the questions which will normally be raised in election contests are those as to which it has expertise, *cf. United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Thus the function of the exhaustion of remedies requirement is analogous to the function of the doctrine stated in *Tucker*. It insures that adequate respect is given to a Congressional allocation of power by requiring union members not to bypass the initial deciding body Congress has chosen to hear their complaints.

The Secretary's main argument in support of his position (Sec. Br. 31, 33) is that the "trigger" theory can be brought into conformity with the complex purposes of the Act by allowing him to substitute a notification to the union prior to instituting suit, which advises it that he is going to proceed on matters which have not been raised by any member, for the Congressional requirement of exhaustion of internal remedies by union members. This argument is untenable. The purpose of Section 402(a) is to foster and protect the public interest in responsible union self-government "by channeling members through

the union's internal processes . . . [thereby] accustom[ing] members to utilizing the remedies made available within their organization." *Laborers' Union,* 389 U.S. at 484. And government by the Secretary in the form of a threat to take coercive action by bringing suit which would subject the union to great expense, unless his fiat is obeyed, rather than through a process of interaction between the union and its members, may be called any of several things but not free and democratic self-government. For this Court has often recognized that actions taken under a threat of litigation are not products of free will, *see e.g. Bantam Books* v. *Sullivan,* 372 U.S. 58, 66-67 (1963). Putting labels to one side, it is perfectly plain that the Secretary's position serves to cripple internal union remedies, and to tend to render them impotent, rather than to strengthen them as Congress intended. It is also clear that this argument if accepted would prove far too much. Since Section 601, as it has been construed, makes it plain that there is no requirement that the Secretary limit his investigations to elections about which there has been a complaint, the Secretary's position, if accepted, would sanction a suit under Section 402(b) to set aside a union election about which no member had complained, as long as the Secretary informs the union that he believes that the election was unlawful prior to filing his suit. The short of it is that the Secretary's approach is to seek to have the limitations on government power contained in Section 402(b) read out of the Act.

The inescapable fact of the matter is that the argument by the Secretary which we have been considering suggests: an inability to understand the rudiments of the concept of free and democratic self-government; an overriding distrust of internal union processes; and a desire to arrogate to himself the maximum in coercive powers. His position is thus completely at odds with Con-

gressional intent. In light of the points we have just made we can find no other explanation for his rhetorical question (Sec. Br. 33): "What difference can it make whether [the] occasion [for internal correction] was the processing of the union member's protest or another time, prior to suit?" Indeed the Secretary's suggestion (Sec. Br. 33-34) that a failure to adopt the "trigger" theory would put a "premium upon union suppression of facts," provides additional support for our assertion that he has failed to understand the policies behind Sections 402(a) and 402(b). For if Congress had been concerned with this remote possibility, it would not have placed the exhaustion requirement in the Act. Moreover, if and when the Secretary is able to prove that a union has attempted to perpetrate such a fraud on himself and the courts, we are confident that the latter would be able to provide relief, *cf. Holmburg v. Armbrecht* 327 U.S. 392, 395-397 (1946). The possibility of suppression of facts is the major policy justification the Secretary advances for his position. Yet in the past he has challenged allegedly illegal union rules, whose existence and terms are matters of public record, even though no member has complained about them. This policy justification provides no support for the institution of such cases. The Secretary's reliance upon it is thus doubly unsound since it is too narrow to justify the rule of law he seeks to have established.

The Secretary next argues (Sec. Br. 31-32, 45) that the language of Section 402(b) ("The Secretary shall investigate such complaint and if he finds probable cause to believe that a violation of this Title has occurred . . . he shall . . . bring a civil action . . .") lends some support to his view that a lawsuit brought under that Section may be based on issues other than those raised by union members. If Section 402(b) began by stating, "The Secretary shall

investigate *in its entirety* any election about which he has received a complaint . . .," we could see some logic in the Secretary's argument that the use of the words "if he finds . . . a violation of this Title has occurred . . . he shall . . . bring a civil action" advances his cause. But that is not the way the legislation reads. Instead, Section 402(b) opens by referring to the member's complaint and by limiting the ensuing investigation and resulting suit to the subject matter of that complaint. Once this point is taken into account, the actual import of Section 402(b), read in its entirety, supports our position rather than the Secretary's, for the reference to the member's complaint is an explicit recognition that Sections 402(a) and 402(b) are related to each other as a single interconnected entity. Since the Secretary's powers are explicitly tied to the member's complaint at the start of Section 402(b), it is most logical to conclude that Congress realized that it was unnecessary, in order to manifest its will, to use the redundant "such violation" rather than "a violation."

The operative language of what was to become Sections 402(a) and 402(b) had hardened into final form as Sections 302(a) and 302(b) of S. 3974 (85th Cong., 2nd Sess.), *see* pp. 34-35, *supra*. Nevertheless, the Secretary's linguistic argument relies on the language of Section (b) of S. 1002 (86th Cong., 1st Sess.), a bill that was not even being considered at the relevant time, to show that the use of the phrase, "a violation" was a conscious rejection of the narrower phrase, "such violation." The temporal difficulties with this position are apparent and these difficulties are plainly fatal once it is recognized that S. 1002 was not in any sense an attempt to amend or perfect S. 3974. It was a complex bill which contained a procedure for regulating elections completely different from that embodied in S. 3974, and in the Act, and it proceeded from far dif-

ferent premises from those shared by the Senators who drafted the final legislation. Clearly, therefore, it is an unlikely source from which to expect enlightenment on the intentions of those who actually conceived the Act.

Contrary to the Secretary (Sec. Br. 32-33), we submit that our position is fully consistent with this Court's explanation of the policy considerations which caused it to reject the argument that the Secretary should be limited "to the specifics of the union member's complaint," *see Laborers' Union*, 389, U.S. at 482-483. The role of the Secretary under the "fair opportunity" test we propose allows him great scope to utilize his "broad investigative powers," his "expertise and the resources of the Labor Department," and to "protect the public interest." Under our view the Secretary is still charged with the responsibility of achieving voluntary compliance; of investigating and, if necessary, prosecuting any matter that the internal complaint of a member may fairly be said to have raised; of drawing together membership complaints about an election, if there are more than one, and welding them into a single coherent lawsuit; of giving form and direction to the statute by issuing rules and regulations which serve to guide union officers and union members; of skillfully developing and arguing before the courts the matters raised by union members; and of investigating union members' unproved or half-proved allegations to see if they have substance and should be pressed to vindicate the public interest in union democracy or should be dismissed short of court; thereby saving the union from the expense of defending frivolous and vexatious litigation. Moreover, he does all this at the public's expense rather than at the expense of union members who might not be able to afford to do it for themselves. Plainly, the diligent and sensitive effectuation of all these tasks is a sufficient responsibility for any Government official.

But as this Court recognized in *Laborers' Union*, 389 U.S. at 484, the Congressional conception of the public interest in union democracy was multifaceted. It was not an expression of a single-minded belief in the efficacy of coercive regulation through lawsuits brought by the Secretary. That aspect of the Act's enforcement machinery must be harmonized with other interests that were also valued by Congress including union autonomy, membership responsibility and the preservation of internal union appellate procedures. To extend the Secretary's powers to their furthest possible reach is to destroy these other equally valid interests. On this basis, we submit that the proper balance can only be struck by limiting the issues that the Secretary can raise in a Title IV court action to those which the union had a fair opportunity to consider in connection with a member's internal complaint.[7]

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[7] The Secretary's argument as to the proper interpretation of Section 402(c) follows the same lines as his argument on Sections 402(a) and 402(b). It is an attempt to destroy the balance struck by Congress in order to ease the restraints the Act puts upon him in his role as a prosecutor of Title IV lawsuits. We are in full agreement with the Union's argument which demonstrates that the Secretary's position is absolutely incompatible with the fact that the Act states that an election shall be set aside only "if upon a *preponderance of the evidence* . . . the court finds . . . that the violation . . . may have affected the outcome of [the] election." (Emphasis added.) Surely, in light of the italicized language, a showing that a willing candidate has been disqualified is at most sufficient only to make out a *prima facie* case and does not create an irrebuttable presumption favoring the Secretary. The reasoning behind this proposition is set out in detail in the Union's brief. Moreover, we have already addressed ourselves to this issue in *Bottle Blowers Assn.*, *see* the AFL-CIO Brief in Nos. 57 & 58, This Term, pp. 42-47, to which we respectfully invite the Court's attention. Since the Court did not reach this issue in *Bottle Blowers Assn.*, 389 U.S. at 476, and since there have been no other new developments, we therefore simply incorporate the Union's argument by reference here.

CONCLUSION

For the above stated reasons, as well as those set out in the Union's brief, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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